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In re: Complaint of XO Tennessee, Inc. Against)
BellSouth and Request for Expedited Ruling and) Docket No. 04-00306
for Interim Relief)
)

**BRIEF OF XO TENNESSEE, INC. ADDRESSING THE IMPACT OF THE FCC'S
ORDER ON REMAND ON XO'S REQUEST FOR INTERIM RELIEF**

XO Tennessee, Inc. ("XO") respectfully submits the following brief addressing XO's request for interim relief and the impact of the FCC's "Order on Remand," released February 4, 2005.¹ First, the Order reaffirms the obligation of BellSouth Telecommunications, Inc. ("BellSouth") to convert special access circuits to unbundled loops at a just and reasonable rate and without further delay. Second, the Order clarifies that most of BellSouth's DS-1 and DS-3 loops, all except those in BellSouth's largest wire centers, remain subject to the unbundling requirements of Section 251 of the federal Telecommunications Act and, therefore, subject to XO's conversion requests. As XO has previously explained, XO believes that none of the BellSouth's DS1 circuits will fall within the exception described in the new rules, and thus, the new rules have no impact on XO's request for interim relief, which contains DS1 circuits only. To resolve any doubt about the issue of which circuits will be affected by the new rules, the FCC has asked BellSouth to file a letter by February 18, 2005, identifying those wire centers where BellSouth is no longer required to provide unbundled DS-1 and DS-3 loops. That information will be also provided to the TRA. Finally, the Order explains that the FCC reached its decision,

¹ In the Matter of Unbundled Access to Network Elements, WC Docket No. 04-313, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, Order on Remand, (rel. February 4, 2005) ("Order")

in part, because of the risk of “abuse by incumbent LECs” (Order at ¶ 48), which have failed to process conversion requests in a timely manner and tried to impose excessive conversion fees. *Id.* at ¶ 64. In other words, the FCC has recognized and condemned precisely the kind of LEC misconduct that XO described in its original complaint.

In sum, the FCC’s Order on Remand has no impact on XO’s request for interim or permanent relief (subject to check based on the information BellSouth is required to provide by February 18th) and, in fact reinforces the argument that XO has been making about BellSouth’s discriminatory and anti-competitive conduct and the need for regulatory intervention.

DISCUSSION

The FCC’s Order contains new rules defining the network unbundling obligations of large incumbent carriers. In the Order, the FCC rejected arguments raised by BellSouth and reaffirmed the agency’s earlier decision that BellSouth is required to convert special access lines to unbundled loops upon just and reasonable terms and conditions. In Paragraph 229 of the Order, the FCC summarized its holding:

We determined in the *Triennial Review Order* that competitive LECs may convert tariffed incumbent LEC services to UNEs and UNE combinations, provided that the competitive LEC seeking to convert such services satisfies any applicable eligibility criteria. The *USTA II* court upheld this determination. The BOC’s have nevertheless urged us in this proceeding to prohibit conversions entirely. Given our conclusion above that a carrier’s current use of special access does not demonstrate a lack of impairment, we conclude that a bar on conversions would be inappropriate.

Id. at ¶ 229 (internal footnotes omitted).

In support of its decision, the FCC cited the difficulties competitive LECs, such as XO, must face in obtaining UNEs from incumbents and in trying to convert special access circuits to UNE loops. *Id.* at ¶ 231 (footnote omitted) (stating, “For example, competitive LECs

demonstrate that they often must purchase special access circuits because they encountered difficulties in purchasing the circuits as UNEs.”); *see also Id.* at ¶ 64 (internal footnotes omitted) (“To the extent competitive LECs are utilizing special access, many carriers may be using such services rather than UNEs, not because special access is a wholesale input that enables competitive LECs to economically compete long-term, but rather because, for various reasons, use of special access has been a necessary precondition to eventual UNE-based competition.”); *see also Id.* at ¶ 231, fn 646 (stating, “In fact, the record shows that many competitive LECs regularly purchase special access services only because incumbent LEC policies and practices have restricted their access to UNEs.”)

As the FCC points out, conversions are a critical element of competition, especially when incumbents put up barriers to obtaining UNEs, because “[i]n those cases, the competitive LECs accept special access pricing in order to provide prompt service to their customers, then convert those circuits to UNEs as soon as possible.” *Id.* at ¶ 231 (footnote omitted). Because competitive LECs are forced into a system of first purchasing the special access circuits on the assumption that they will be converted to UNEs, incumbents are essentially afforded the power to decide whether or not they will allow the competitive LECs to be able to fully compete in the market. As the FCC warned, “This development would put the unbundling determination entirely in the hands of the incumbent LEC, which could exercise its market power to rig competitors’ UNE access entitlements and foreclose long-term competition.” *Id.* at ¶ 59 (footnote omitted).

This system obviously causes problems for competitors. The FCC cited some of these issues, explaining that, “For example, it appears that some carriers signed up customers only to learn that UNEs were not available pursuant to ‘no facilities’ policies, while others adopted a

strategy initially relying on special access and experienced delays or other difficulties in converting special access to UNEs.” *Id.* at ¶ 64 (footnotes omitted). Furthermore, according to the FCC, “The record also reveals that incumbent LECs sometimes do not permit competitors to obtain new circuits as UNEs, and only permit the competitive LEC to convert facilities obtained as special access to UNEs after a ‘holding period’ of one to several months.” *Id.*

XO’s situation is a clear example of the abuse that can occur when an incumbent erects barriers to the conversion process.² Under the interconnection agreement (“ICA”) between XO and BellSouth, BellSouth is required to provide XO with access to UNEs. Section 1.1 of Attachment 2 to the ICA states “BellSouth shall, upon the request of NEXTLINK [now XO], and to the extent technically feasible, provide NEXTLINK access to its unbundled Network Elements in a manner that allows NEXTLINK to provide any telecommunications service that can be offered by means of that Network Element.” (A copy of the relevant portion of the ICA is attached). Thus, BellSouth has a clear, legal obligation to provide UNEs, such as unbundled loops, to XO. As explained in XO’s complaint, XO has been trying unsuccessfully to obtain unbundled loops from BellSouth by converting existing special access circuits to UNE loops. BellSouth, however, continues to refuse to process these conversions upon just and reasonable terms or, as XO has suggested as an interim solution, at the “switch as is” rate set forth in the parties’ ICA.³ As the FCC stated, “[P]ermitting conversions where requesting carriers are impaired, and, thus, legally entitled to UNEs, ensures that competitive LECs are able to obtain

² XO is the nation’s largest facilities-based CLEC and, of all the DS-1 and DS-3 circuits leased by XO for which UNEs are available, more than 75% are provisioned as UNEs or are subject to pending conversion requests. *Id.*, at fn 179

³ The “switch as is” rate for conversions of special access to EELs could be used as the permanent rate, as BellSouth has admitted, in the course of discovery in the Florida proceeding on conversions, that the process for the conversions at issue is the same process. The “switch as is” rate in Florida is \$8 98

network elements at prices that allow them to compete, as envisioned by the 1996 Act.” Order at ¶ 231, fn 650. Thus, as the Order makes clear, BellSouth’s continuing refusal to complete the requested conversions upon reasonable terms and conditions is a violation of the Act itself.

Finally, and perhaps most importantly, the Order clarifies which loops are, or are not, subject to the unbundling requirements of Section 251 of the Act and, therefore, remain subject to conversion requests. As discussed above, and as previously explained by XO in its earlier filings, the FCC’s new rules require the unbundling of DS-1 and DS-3 loops in all wire centers except the very largest. At this time, XO believes that BellSouth is required to convert all of XO’s special access lines in Tennessee to unbundled loops and that none of the exceptions set forth in the Order are applicable to XO’s request. The TRA, however, need not speculate on this point. On February 4, 2005, the FCC’s Wireline Competition Bureau asked BellSouth to give the FCC a list of BellSouth wire centers which “satisfy the nonimpairment thresholds for DS-1 and DS-3 loops” by February 18, 2005. Letter from Jeffrey J. Carlisle, Chief, Wireline Competition Bureau, to Herschel L. Abbott, Jr., Vice President of Governmental Affairs, BellSouth, WC Docket No. 04-313, CC Docket No. 01-338 (dated February 4, 2005). (A copy of the letter is attached.) Thus, the TRA will know well before this proceeding next comes before the agency on February 28, 2005, whether any of the conversion requests made by XO involve DS-1 or DS-3 lines which are no longer subject to unbundling requirements.

CONCLUSION

The new FCC rules do not change XO’s right to have BellSouth to convert special access circuits to UNE loops (which, again, only amounts to a change in the billing rate), upon just and reasonable terms, and the new rules also indicate that except in BellSouth’s largest wire centers, all DS-1 and DS-3 loops remain subject to the Act’s unbundling requirements. Within one week,

the TRA will be able to confirm which, if any, of BellSouth's DS-1 and DS-3 loops in Tennessee are exempt from those requirements. By February 28, 2005, there should be no reason why the Authority cannot and should not grant XO's request for interim relief.⁴

Respectfully submitted,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

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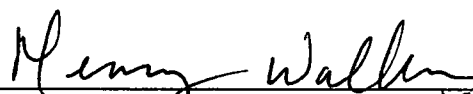
⁴ As previously discussed by XO, XO is asking the TRA to set an interim rate, subject to true-up, of \$52.73 for the first conversion and \$24.62 for each additional conversion. This rate, which would apply to conversions of both DS-1 and DS-3 loops, is the current rate charged by BellSouth to convert an "as is" special access circuit to an unbundled EEL (unbundled loop plus unbundled transport) in Tennessee. In the alternative, XO requests that the TRA order BellSouth to file a cost-based rate for converting special access lines to UNE loops and the TRA could adopt that rate, subject to true-up, as the interim conversion rate in this proceeding. In either case, the interim rate should apply to all conversion requests pending at the time that the Triennial Review Order became effective. See TRO, paragraph 589, "To the extent pending requests have not been converted, however, competitive LECs are entitled to appropriate pricing up to the effective date of this Order."

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing is being forwarded via U.S. Mail, postage prepaid, to:

Guy Hicks
BellSouth Telecommunications, Inc.
333 Commerce Street, Ste. 2101
Nashville, TN 37201-3300

on this the 11th day of February 2005.


Henry M. Walker TCG

ACCESS TO UNBUNDLED NETWORK ELEMENTS

1. Introduction

- 1.1 BellSouth shall, upon the request of NEXTLINK, and to the extent technically feasible, provide NEXTLINK access to its unbundled Network Elements in a manner that allows NEXTLINK to provide any telecommunications service that can be offered by means of that Network Element. BellSouth's provision of Network Elements which the FCC and/or applicable state commission have ordered BellSouth to unbundle, or Network Elements BellSouth unbundles for other telecommunications carriers, shall be deemed technically feasible.
- 1.2 Unbundled Network Elements provided pursuant to this Agreement may be connected to other Services and Elements provided by BellSouth, or to any Services and Elements provided by NEXTLINK or by any other vendor or telecommunications carrier.
- 1.3 To ensure parity in its provision of Network Elements, BellSouth shall comply with the quality standards set forth in the technical documents in this Attachment. In addition, BellSouth shall provide access to unbundled Network Elements and the services and functionalities underlying such Elements, at least at parity to the access it provides itself, affiliates end users and other telecommunications carriers. If NEXTLINK requests a quality of performance that exceeds the quality of performance required by industry standards or the actual quality of performance that BellSouth provides to itself, its affiliates, end users, or other telecommunications carriers, then NEXTLINK shall request such higher quality performance through the Bona Fide Request process, as set forth in Attachment 10 of this Agreement.
- 1.4 **Combination of Network Elements**
 - 1.4.1 NEXTLINK may purchase Unbundled Network Elements for the purpose of combining such Network Elements in any manner that it chooses in order to provide telecommunications service.
 - 1.4.2 Except at NEXTLINK's request, BellSouth shall not separate Network Elements requested by NEXTLINK that BellSouth currently combines. BellSouth will provide such Network Elements to NEXTLINK at the sum of the rates for each element as ordered by the FCC.
 - 1.4.3 Within thirty (30) days of the effective date of the FCC's Order in 96-98 Remand Proceeding or within thirty (30) days of the effective date of any subsequent FCC order required as a result of the 96-98 Remand



Federal Communications Commission
Washington, D.C. 20554

February 4, 2005

Via Facsimile and First Class Mail

Herschel L. Abbott, Jr.
Vice President - Governmental Affairs
BellSouth
1133 21st Street, NW, Suite 900
Washington DC 20036

**Re: Unbundled Access to Network Elements, WC Docket No. 04-313; Review of Section 251
Unbundling Obligations for Incumbent Local Exchange Carriers, CC Docket No. 01-338**

Dear Mr. Abbott:

On February 4, 2005, the Commission released its *Triennial Review Remand Order*, adopting rules governing the unbundling obligations of incumbent LECs regarding, among other things, dedicated transport and high-capacity loops.¹ In crafting impairment thresholds for these elements that relied on readily ascertainable, quantitative criteria, the Commission sought to facilitate prompt implementation of its revised rules, and to minimize disputes regarding the scope of an incumbent LEC's unbundling obligations in any particular case. The Bureau is mindful of the need for certainty within the industry regarding the scope of unbundling obligations. Such certainty depends on the timely incorporation of the *Triennial Review Remand Order's* fact-dependent rules into revised interconnection agreements. To this end, we ask that you provide the Bureau a list identifying by Common Language Location Identifier (CLLI) code² which wire centers in your company's operating areas satisfy the Tier 1, Tier 2, and Tier 3 criteria for dedicated transport, and identifying by CLLI code the wire centers that satisfy the nonimpairment thresholds for DS1 and DS3 loops.³ We ask that you submit this information into the above-referenced dockets by February 18, 2005.

The Bureau believes that this information will expedite the implementation of the Commission's rules implementing the Act. I thank you in advance for your prompt reply to this request.

Sincerely,

/s/

Jeffrey J. Carlisle
Chief, Wireline Competition Bureau

¹ *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand (*Triennial Review Remand Order*)

² The CLLI code is an eight character code that identifies a particular wire center.

³ *Id.* at para. 120 (defining Tier 1 wire centers), *id.* at para. 126 (defining Tier 2 wire centers), *id.* at para. 131 (defining Tier 3 wire centers), *id.* at para. 185 (defining wire center nonimpairment threshold for DS3 loops), *id.* at para. 189 (defining wire center nonimpairment threshold for DS1 loops), *see also id.*, App. B, 47 C.F.R. §§ 51.319(a)(4)(i), (a)(5)(i), (e)(3).